89-421

No. _____

SEP 1 1989

In the

Supreme Court of the United States

October Term, 1989

DEMOS REALTY,

Petitioner,

v.

MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING WRIT 5

I. THE MCDA HAS NEVER CONTESTED THAT STATE ACTION IS INVOLVED 5

II. THE ESTABLISHMENT CLAUSE HAS NOT BEEN VIOLATED 5

A. The YMCA Receives No Aid From the MCDA 5

B. Use Restrictions Are Not Required 6

C. If The YMCA Receives Any Benefit From The MCDA's Participation In LaSalle Plaza, That Benefit Is The Same As Any Other Occupant In LaSalle Plaza 7

D. The Establishment Clause Does Not Require Total Separation Of Church And State 8

E. The Nature Of The YMCA's Activities Dictates A More Lenient Establishment Clause Standard 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:	Page
Board of Educ. v. Allen, 392 U.S. 236 (1968)	9
Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	9
Everson v. Board of Educ., 330 U.S. 1 (1947)	8
Hunt v. McNair, 413 U.S. 734 (1973)	9
In re Condemnation by the Minneapolis Community Dev. Agency, 439 N.W.2d 708 (Minn. 1989)	6, 7
Lemon v. Kurtzman, 403 U.S. 602 (1971)	5
McGowan v. Maryland, 366 U.S. 420 (1961)	9
Mueller v. Allen, 463 U.S. 388 (1983)	7
Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976)	8, 9
Tilton v. Richardson, 403 U.S. 672 (1971)	9
Walz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970)	8
Zorach v. Klauson, 343 U.S. 306 (1952)	8

The respondent Minneapolis Community Development Agency ("MCDA") respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 439 N.W.2d 708 (Minn. 1989).

STATEMENT OF THE CASE

I.

THE LASALLE PLAZA DEVELOPMENT

For many years the City of Minneapolis, Minnesota ("City"), and its redevelopment authority, the MCDA, have undertaken substantial efforts to redevelop the City's downtown area. Many city blocks have been rebuilt and others are in various stages of redevelopment. There is no religious motivation for the rebuilding of the central city.

In 1986, the MCDA contracted with HTPG Associates Limited Partnership ("HTPG Associates"), a private developer, to redevelop an entire city block in downtown Minneapolis. The block is located within a development district created by the City known as "Development District No. 58 (Greater Hennepin Avenue)." When redeveloped, the block will be known as "LaSalle Plaza." LaSalle Plaza, which is currently under construction, will convert property not now in productive use into a retail, office and entertainment complex vital to the City's continued development. The project will also preserve buildings of historic and design significance.

Pursuant to the terms of the development contract between the MCDA and HTPG Associates, the MCDA acquired the entire block through condemnation or negotiated purchase. The MCDA condemned the property owned by petitioner Demos Realty ("Demos") within the block. Among the properties the MCDA agreed to purchase within the block was the historic building owned and occupied by the Young Men's Christian Association of Minneapolis ("YMCA"). The MCDA purchased the YMCA building at a negotiated price and conveyed it to HTPG Associates for $1 upon satisfaction of certain conditions.

As part of the development contract with the MCDA, HTPG Associates agreed to renovate the historic YMCA building for office or residential space and to retain the historic State Theater also located on the block. These requirements are based on the historic and architectural importance of the existing YMCA building and the State Theater.

Prior to entering into the development contract with the MCDA, HTPG Associates acquired a major portion of the block with an eye toward redevelopment and negotiated a letter of intent with the YMCA to sell space in the proposed development to the YMCA for construction of its new facility. For almost ten years, the YMCA had been seeking ways in which it could replace its aging facilities with a new building that would better serve the needs of its members. Moreover, construction of the new YMCA facility in the block was contemplated to enhance the entertainment district concept for the proposed project and to strengthen its retail and office leasing markets, thus helping to ensure the economic viability of the development.

The development agreement between the MCDA and HTPG Associates required consummation of the agreements outlined in the letter of intent as a condition for inclusion of the existing YMCA property in the project. Retention of the YMCA in LaSalle Plaza both furthered the objectives of the development district and minimized the condemnation and relocation expenses of the MCDA for the project. Under the terms of the development agreement, the project could have proceeded without the new YMCA if the YMCA and HTPG Associates had been unable to reach agreement.

Under the agreement between HTPG Associates and the YMCA, the YMCA will build its new facility within LaSalle Plaza with its own funds. The YMCA will purchase air space in LaSalle Plaza from HTPG Associates for $630,000. The YMCA will share the expense of constructing common "support elements," consisting of footings and columns that will support both the HTPG Associates and the YMCA units. The YMCA, as an independent developer, will then build its new facilities at its own expense. The YMCA will enter into separate agreements with its own architect and contractor for the design and construction of its facilities.

Under the terms of the agreement between the developer and the YMCA, therefore, the construction of the condominium unit and the financing of both the hard and soft costs for the new YMCA facility are independent of the construction and funding obligations of the developer. The YMCA will therefore receive no financial assistance from either HTPG or the MCDA.

II.

THE YMCA

The YMCA, commonly known as "the Y," provides health and recreational facilities that are used by many individuals who live or work in the downtown community. The YMCA is a unique facility in downtown Minneapolis. As a non-profit, service-oriented institution, its presence in the inner-city is an important community asset.

The characterization of the YMCA as a "religious organization" must be examined in light of the institution's community-wide operations. The YMCA requires no religious belief, training, or religious affiliation for its members. When one thinks of the YMCA, one entertains images of a health facility, or an organization with a variety of community programs. One does not envision a house of worship nor think of a religious society aimed at indoctrinating its membership. Moreover, the United Way of Minneapolis, which does not subsidize religious activities, has provided funds to the YMCA since the early 1920s and considers the YMCA "a public institution and provider of broad based community services unrestricted in availability by racial, ethnic or religious background."

III.

THE DECISION BELOW

Upon the motion of the MCDA, the Minnesota Supreme Court reviewed the decision of the trial court in this matter on an accelerated basis. The MCDA sought accelerated review solely to prevent the delay associated with the traditional appeal process

from jeopardizing the complex financing and leasing commitments for LaSalle Plaza, thus minimizing the MCDA's exposure to financial liability. Despite Demos' assertion to the contrary, neither Demos nor the MCDA requested the Minnesota Supreme Court to grant accelerated review of the matter because of the importance of the questions presented. The Minnesota Supreme Court unanimously affirmed the decision of the trial court that the participation of the MCDA in LaSalle Plaza does not violate the Establishment Clause of the First Amendment.

REASONS FOR DENYING THE WRIT

I.

THE MCDA HAS NEVER CONTESTED THAT STATE ACTION IS INVOLVED

The first question presented by Demos fails to raise an issue for consideration by this Court. The MCDA has never disputed state action was present in the LaSalle Plaza development. The MCDA has always acknowledged that the exercise of its power of eminent domain to condemn property in the block and the use of tax increment financing to fund acquisition costs amounts to state action. In addition, the Minnesota Supreme Court did not conclude that state action was absent from the project. State action is, therefore, not an issue in this matter.

II.

THE ESTABLISHMENT CLAUSE HAS NOT BEEN VIOLATED

A. The YMCA Receives No Aid From The MCDA

The Minnesota Supreme Court's well reasoned decision reflects the complete attention it gave to the controlling issues in this case. The decision is not in conflict with the precedent established by this Court. Demos acknowledges that the MCDA's involvement with the LaSalle Plaza project meets the first and third prongs of the three part test articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), for analyzing challenges to governmental actions under the Establishment Clause: the MCDA's participation in LaSalle Plaza has a secular purpose and excessive governmental entanglement is not involved. Instead, the Demos argument focuses on the second prong of the *Lemon* test, which requires that the "*principal* or *primary* effect [of the governmental involvement] must be one that neither advances nor inhibits religion." *Id.* (Emphasis added.)

The Minnesota Supreme Court correctly applied the second prong of the *Lemon* test when it held that the MCDA's participation in LaSalle Plaza "neither advances nor inhibits religion." *In re Condemnation by the Minneapolis Community Dev. Agency*, 439 N.W.2d 708, 713 (Minn. 1989). The Demos argument asserts that the Minnesota Supreme Court misapplied the second prong based on Demos' incorrect statement that the court held "aid could be given without secular use restrictions placed on it." *Demos Petition*, at 5. The Demos argument ignores the trial court's finding of fact that the YMCA receives no financial assistance from the MCDA's participation in LaSalle Plaza. The Demos argument also ignores the Minnesota Supreme Court's determination that the trial court's finding that "no aid was given to the YMCA" was not clearly erroneous given the trial court's review of the volumes of contract documents. *Id.* at 712–713. The Minnesota Supreme Court held that "[b]ecause any aid would not have a primary effect of advancing religion, [it] need not consider whether, in fact, aid is being received." *Id.* at 712. Nevertheless, the Minnesota Supreme Court noted that "the YMCA is not receiving any public subsidy but is paying its own way." *Id.* at 713. In an attempt to impose secular use restrictions on the YMCA, Demos incorrectly would have this Court assume that the YMCA will receive direct financial aid from the MCDA. Since no aid is provided to the YMCA, it is not necessary for this Court to determine whether secular use restrictions on the YMCA are required.

B. Use Restrictions Are Not Required

The focus of the Demos petition, secular use restrictions, was considered by the Minnesota Supreme Court in its analysis of the "excessive entanglement" prong of the *Lemon* test. The Minnesota Supreme Court appropriately found that the MCDA's involvement with the LaSalle Plaza project did not constitute excessive governmental entanglement with religion, and therefore secular use restrictions were not necessary:

> To the extent the Development Agency has assisted to make the YMCA property available to the project, this

> is, as already observed, a one time assistance only, which does not present any entanglement requiring use restrictions.

Id. at 714. Demos concedes, however, that excessive governmental entanglement with religion does not result from LaSalle Plaza. Use restrictions are therefore unnecessary to preserve the project's constitutionality.

C. If The YMCA Receives Any Benefits From The MCDA's Participation In LaSalle Plaza, Those Benefits Are The Same As Any Other Occupant In LaSalle Plaza

As Demos notes in its petition, an important consideration for determining whether the second prong of the *Lemon* test is met is whether the governmental action benefits a single religious entity or whether the benefits accrue to a broad group of which religious organizations are only a part. If a benefit accrues to the YMCA because of the MCDA's participation in LaSalle Plaza, that benefit can be no different than the benefit realized by other occupants in the project. The YMCA, therefore, has not been singled out for favor. Moreover, the people who will benefit from the inclusion of the YMCA in LaSalle Plaza — persons who live and work in the City of Minneapolis — are not limited to a particular religious group. Any "attenuated financial" benefit received by the YMCA as a result of the MCDA's involvement with the project is *not* the type of danger which the Establishment Clause of the First Amendment seeks to guard against. *See Mueller v. Allen,* 463 U.S. 388, 400 (1983).

The *Mueller* case is particularly illustrative of the second prong of the Establishment Clause test. *Mueller* involved a suit by Minnesota taxpayers challenging the validity of a tax deduction for parents who sent their children to parochial schools. This Court held that the tax deduction did not violate the Establishment Clause of the First Amendment. In reaching its decision, the Court focused upon the benefits which parochial schools provide to society and found that the tax deduction was a "rough return" for those benefits. *Id.* at 402.

Likewise, balancing the interests at hand, the MCDA and the public have a substantial interest in proceeding with this matter pursuant to the terms of the development agreement. The presence of the YMCA in the development will help to ensure the economic viability and success of the development. A successful development, in turn, will provide a substantial increase to the tax base of the City of Minneapolis. In addition, an historic structure will be preserved, and the presence of the YMCA downtown, and the valuable community services it provides, will be maintained. Finally, construction of the new facility will inject millions of construction dollars into the area's economy.

Demos' attempt to impose use restrictions on the YMCA by arguing that a single religious group has been singled out for benefit, therefore, is without merit. Any benefit provided to HTPG Associates by the MCDA which in turn benefits the YMCA is akin to the "rough return" found to be constitutional in *Mueller* and does not violate the Establishment Clause.

D. The Establishment Clause Does Not Require Total Separation of Church and State

Even if the trial court had found that the MCDA's participation in LaSalle Plaza provided aid to the YMCA, the MCDA's participation would not violate the Establishment Clause of the First Amendment. "The First Amendment... does not say that in every and all respects there shall be separation of Church and State." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 668 (1970), *quoting Zorach v. Klauson*, 343 U.S. 306, 312 (1952). The Supreme Court has "enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 745 (1976); *see also Walz*, 367 U.S. at 670 ("no perfect or absolute separation is really possible").

States, therefore, are permitted to supply transportation for children to and from church-related as well as public schools. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). States are also permitted to loan secular textbooks on equal terms to students

attending both public and church related elementary schools. *Board of Educ. v. Allen*, 392 U.S. 236 (1968). Furthermore, states are permitted to enact Sunday closing laws even though an undeniable effect of such laws is to render it somewhat more likely that citizens will respect religious institutions and even attend religious services. *McGowan v. Maryland*, 366 U.S. 420 (1961). In its decisions concerning the Establishment Clause, this Court has put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity. *Roemer*, 426 U.S. at 747; *see also Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973) ("an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law").

E. The Nature of the YMCA's Activities Dictates A More Lenient Establishment Clause Standard

Finally, it is also important to consider the character of the institution that is the focus of the Establishment Clause analysis. *See, e.g., Hunt v. McNair*, 413 U.S., 734, 743 (1973). Despite the "institutional rhetoric," the YMCA, with its athletic facilities and other secular activities, is not pervasively religious in the same way that a typical church is religious. A more lenient standard for minimizing State involvement therefore applies to an institution such as the YMCA as opposed to a church. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 681 (1971), (greater State involvement permitted with church affiliated colleges than with the church-run elementary schools at issue in *Lemon*).

CONCLUSION

The Minnesota Supreme Court's determination that the primary effect of the MCDA's participation in LaSalle Plaza neither advances nor inhibits religion is consistent with the precedent of this Court. Accordingly, secular use restrictions on the YMCA are not required. The MCDA therefore respectfully requests that the petition for a writ of certiorari be denied.

Dated: August 31, 1989

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